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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-821

EARL BUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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(A) No Mailing Charged In This Case Constituted A Necessary Part Of The Allegedly Fraudulent Scheme Or Transaction Which Led To Petitioner Bush's Receipt Of The Monies;

(B) Rather, Each Relevant Mailing Charged Merely Is A Letter Transmitting Funds (Already Paid To, Received And Owned By Petitioner Bush) From One Of His Bank Accounts To Another;

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Earl Bush, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 4, 1975. On November 11, 1975, after less than one week's consideration and without a response by the government, petition for rehearing and *en banc* suggestion were denied. This petition for certiorari is filed within thirty days of that date. The Court of Appeals, on November 13, 1975, entered an order staying the mandate pending application for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether this "mail fraud" prosecution and conviction lies outside the proper ambit of the federal mail fraud statute, particularly in light of this Court's recent ruling in *United States* v. *Maze*, where:

   (A) No mailing charged in this case constituted a necessary part of the allegedly fraudulent scheme or transaction which led to Petitioner Bush's receipt of the monies;

   (B) Rather, each relevant mailing charged merely is a letter transmitting funds (already paid to, received and owned by Petitioner Bush) from one of his bank accounts to another;

   (C) Moreover, these transmittal letters in no way served to conceal or delay discovery of any purported scheme; if anything, the mailings increased the probability that Petitioner Bush's alleged fraudulent scheme would be detected.

2. Whether, in applying the federal mail fraud statute to Petitioner Bush's conduct, the Seventh Circuit has interpreted that statute in a manner so novel and unpredictable as to:

(A) Define as "a crime" conduct which was not foreseeably criminal when committed, thereby violating this Court's oft-articulated principle that no person shall be held criminally responsible for conduct which he could not reasonably have understood to be proscribed;

(B) Create *ex post facto* "judicial legislation" in clear violation of Petitioner's Due Process rights as well as his constitutional rights under Article I, Section 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article I, Section 10 and the Fifth Amendment; and Title 18 United States Code, Section 1341 (Mail Fraud Statute) are involved herein and are set forth in Appendix E.

STATEMENT OF THE CASE

There is little dispute concerning the facts in this case. Petitioner Earl Bush served Chicago's Mayor Richard J. Daley, as his press secretary, for eighteen years. Unlike the defendants in certain other recent, celebrated North-

ern District of Illinois federal prosecutions, Bush was neither a politician nor public official. During the years he worked as press secretary, Bush consistently supplemented his income by undertaking various public relations, public speaking and advertising assignments in his spare time. For many years Bush made certain that all his miscellaneous income was deposited in the "Earl Bush Trust" at Sears Bank and Trust Company, Chicago ("SEBAT"), so that all his miscellaneous income would be fully accounted-for and all due taxes paid thereon.

It is undisputed, as the Seventh Circuit Panel confirmed, that Bush committed no extortion or bribery, nor did he pay out or receive any kickbacks or violate any state criminal law. (Op. at 8, App. B) This conviction under the federal mail fraud statute is based on the theory that Bush's *nondisclosure* of his ownership of an advertising display company constituted a breach of his *moral duty* to the Mayor and citizens of Chicago.[1] It is undisputed

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[1] The Indictment in this case charged, in pertinent part:

12. Prior to January 1, 1961 and continuing thereafter up to on or about July 15, 1973 at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

EARL BUSH,

defendant herein, devised and intended to devise a scheme and artifice:

(a) To defraud the citizens of the city of Chicago, its Mayor, officials and employees of their right to the conscientious, loyal, disinterested and unbiased services, actions and performance of official duties by defendant Earl Bush, in his official capacities as an employee of the city of Chicago and as Press Secretary and Director of Public Relations in the office of the Mayor of the city of Chicago, free from corruption, extortion, partiality, wilful omission, bias, dishonesty, official misconduct, conflict of interest and fraud;

(b) To defraud the citizens of the city of Chicago, its Mayor, officials and employees of their right to have the city's business

(footnote continued on following page)

that Bush scrupulously avoided telling those in positions of influence of his ownership of the advertising display company that bid for and was awarded a contract for advertising display at O'Hare Airport. It also is undisputed that Bush's company had entered the lowest bid to the City Council and that the resulting contract and renewal thereof

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and its affairs conducted honestly, impartially, free from deceit, extortion, corruption, fraud, dishonesty and conflict of interest, and in accordance with the laws of the state of Illinois;

(c) To defraud the city of Chicago, its officials and employees, including the Mayor of the city of Chicago, of their right to have available and be aware of all relevant and pertinent facts when:

(1) bargaining and negotiating with companies seeking to do and to continue to do business with the city of Chicago and agencies and municipal bodies thereof;

(2) evaluating and analyzing the terms and conditions of proposed contracts of companies seeking to do and to continue to do business with the city of Chicago and agencies and municipal bodies thereof; and

(3) entering into, renewing, and executing legally binding contracts and agreements with companies seeking to do and continue to do business with the city of Chicago and agencies and municipal bodies thereof.

(d) To defraud the Mayor of the city of Chicago of his right to have available and be aware of all relevant and pertinent facts in determining whether Earl Bush should continue to be employed by the city of Chicago.

(e) To defraud the city of Chicago and its citizens of certain secret profits obtained by defendant Earl Bush while an officer and employee of the city of Chicago; and

(f) To obtain money, property and things of value by means of false and fraudulent pretenses, representations, and promises, which money, property and things of value included but are not limited to:

(1) monies in the form of salary payments from the city of Chicago;

(2) maintenance of his position as an employee of the city of Chicago and as Press Secretary and Director of Public Relations in the office of the Mayor of the city of Chicago; and

(3) monies from Dell Airport Advertising, Inc.

has been highly profitable for the City of Chicago for over a decade. The decision of the Mayor's committee to recommend the DAAI[2] contract to the City Council, in complete absence of knowledge of Bush's interest, was based solely on esthetics of DAAI's design and the benefits to the City of Chicago (Tr. 144, 147, 249, 303-305, 317). There was no evidence at trial that the City would have or could have obtained more money if Bush had not owned DAAI or if any City official had known of Bush's ownership. Bush himself *took no part* in the negotiation, recommendation or renewal of the contract (Tr. 247-249). The inescapable fact is that the DAAI contract stood or fell on its own terms and it was approved and adopted by the City above the competing contract because it was the best deal for the City (Tr. 157, 249, 303-304, 317). In fact, although in the wake of these charges Bush disposed of his DAAI ownership, the City continued to maintain the advertising contract with DAAI because the service from the display people and the compensation to the City have been evaluated as the best that any aviation facility has received in the United States.

Bush fulfilled the State of Illinois legal requirement that he disclose any and all economic interests by filing a verified statement thereof.[3] He did not, however, fulfill Mayor

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[2] "DAAI" will be used herein as the abbreviation for Dell Airport Advertising, Inc., the corporation of which Earl Bush was the sole owner and shareholder during the entire period charged in the indictment.

[3] Ill. Rev. Stat., Ch. 38. §604A-101 (Supp. 1973), provides, *inter alia*:

"The following persons shall file verified written statements of economic interests, as provided in this Article:

(i) Persons who are employed . . . by any unit of local government as defined by the Illinois Constitution, and are compensated for services as employees and not independent contractors at the rate of $20,000 per year or more . . . ."

Daley's 1972 and 1973 informal request that all of his staff members and department heads provide the Mayor with copies of the statements they filed pursuant to the Illinois law. Bush submitted forms at the Mayor's request on which the word "none" was set forth in the same place where Bush had disclosed his DAAI ownership on the forms he had filed with the County Clerk pursuant to the Illinois statutory requirement. It should be noted that no mailing was involved in the submission of any of these forms. For this, in the wake of adverse publicity, Mayor Daley fired Bush in 1973.

Petitioner Bush was convicted on eleven counts of mail fraud, and the trial judge imposed concurrent one year terms of incarceration upon each count.

REASONS FOR GRANTING THE WRIT

I.

THIS "MAIL FRAUD" PROSECUTION AND CONVICTION LIES FAR OUTSIDE THE PROPER AMBIT OF THE FEDERAL MAIL FRAUD STATUTE, PARTICULARLY IN LIGHT OF THIS COURT'S RECENT RULING IN UNITED STATES v. MAZE, WHERE:

(A) NO MAILING CHARGED IN THIS CASE CONSTITUTED A NECESSARY PART OF THE ALLEGEDLY FRAUDULENT SCHEME OR TRANSACTION WHICH LED TO PETITIONER BUSH'S RECEIPT OF THE MONIES;

(B) RATHER, EACH RELEVANT MAILING CHARGED MERELY IS A LETTER TRANSMITTING FUNDS (ALREADY PAID TO, RECEIVED AND OWNED BY PETITIONER BUSH) FROM ONE OF HIS BANK ACCOUNTS TO ANOTHER;

(C) MOREOVER, THESE TRANSMITTAL LETTERS IN NO WAY SERVED TO CONCEAL OR DELAY DISCOVERY OF ANY PURPORTED SCHEME; IF ANYTHING, THE MAILINGS INCREASED THE PROBABILITY THAT PETITIONER BUSH'S ALLEGED FRAUDULENT SCHEME WOULD BE DETECTED.

The indictment fails to charge, and the evidence introduced at trial fails to prove any use of the mails sufficiently closely related to the alleged scheme that would serve to properly bring Earl Bush's conduct within the ambit of the federal mail fraud statute.

In this eleven count indictment, each count named one letter. Each letter is set forth in its entirety in Appendix

A. The five letters named in Counts 1 through 5 are letters from Sidney Drury, the attorney for both Earl Bush and Dell Airport Advertising, Inc., to the Sears Bank and Trust Company, transmitting dividend checks issued by DAAI. *It is undisputed that DAAI was during the entire time in question in this case owned solely by Earl Bush.* In each of these letters, Drury instructed John Carbery, a trust officer at the Sears Bank, to deposit the checks into the "Earl Bush Trust."

The five letters named in Counts 6 through 10 are letters from DAAI to Sidney Drury, enclosing dividend checks issued by DAAI. Drury testified that these same checks were transmitted by him to Sears Bank and Trust.

Summarizing, the ten letters, each named in one of Counts 1 through 10 of the indictment, concern the distribution of funds by DAAI (or, effectively, by Earl Bush since DAAI was owned solely by Bush) to Earl Bush's own trust account. *Therefore, these were "transfers" by Earl Bush, of Earl Bush's own funds, to Earl Bush.* The letter named in Count 11, admitted as Government Exhibit I-49, is a routine, inconsequential letter, dated July 1, 1969, from John Dell to Aviation Commissioner William E. Downes, Jr., concerning the remodeling of four existing hotel reservation displays pursuant to the contract entered into in 1967.[4]

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[4] Although proof of other mailings was introduced, these being checks representing proceeds of the 1962 contract, which were mailed from Dell Airport Advertising, Inc. to Information Consultants, the Government recognized by the form of the indictment that these mailings were barred by the five-year statute of limitations. In any event, these uncharged mailings, like those charged, took place only after proceeds of the alleged scheme were received by Bush and therefore similarly are not sufficiently connected to any scheme or artifice to defraud.

In basing its "mail fraud" case on these eleven mailings, the government has overlooked the critical fact that, because Bush owned DAAI by the time the mailing transmitting the dividends took place, the proceeds of the alleged "scheme to defraud" were committed to, had been paid to, and received by Earl Bush. The mailings are in no way sufficiently related to the scheme to bring them within the ambit of federal jurisdiction pursuant to the mail fraud statute.[5]

In order to fully appreciate the sheer irrelevance of the mailings to the "scheme" charged it is helpful to analyze the mailings vis-a-vis the elements of the alleged "scheme." Viewing the evidence in the light most favorable to the Government, the following conduct, time period and charge of mailing can be analyzed as follows on pages 12 and 13:

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[5] It is clear from the early Congressional debate concerning the passage of the Mail Fraud Statute that the bill was primarily directed towards organization of the postal department and was not meant to serve as a broad criminal statute upon which the federal government could prosecute various types of fraudulent schemes. *Congressional Globe*, 42nd Cong., 2nd Sess., pp. 2640-53. In fact, at the very same time that the mail fraud provision was under consideration, Congress also was considering one of the first criminal justice acts—completely separate and apart from the postal bill. *Id.* at 3949. There does not appear to have been any substantial debate involving the passage of the mail fraud provision, nor any indication that this provision was to be construed in such a manner as to enlarge federal jurisdiction over criminal activities.

When the mail fraud provision was next considered by Congress, in 1889, it was slightly amended. The debates on the amendment reveal the true intent and scope that Congress originally intended the mail fraud statute to carry. See 25 Stat. 873. (March 2, 1889) The legislators manifested only a concern for regulating the actual use of the mails to perpetrate a fraud (in particular, the sending of counterfeit money through the mails). See *e.g. Congressional Record*, 50th Cong. 2nd Sess., at p. 2564 (March 1, 1889).

ANALYSIS OF USE OF THE MAILS

Date	The Seventh Circuit's Factual Summary	Was Use of the Mails Charged?
1961:	Bush's company, Dell Airport Advertising, Inc., entered into a joint venture with a company owned by John and Robert Dell, Dell Displays, Inc. The Dell's company was to do the advertising work at O'Hare Airport and Bush's company would hold the contract with the city and be compensated in consideration for Bush's idea in originating the three-dimensional shadow box display case, the idea on which the contract was based. The Seventh Circuit took the position that the jury could have reached the additional factual conclusion that it was Bush's responsibility to promote the contract, although Petitioner vigorously contests any such conclusion.	NO
	Bush told Robert Dell *not* to use his name in connection with *any work* regarding the airport contract.	NO
	Bush introduced Robert Dell to William Downes, the Commissioner of Aviation. Downes was *not* informed of Bush's interest in the airport advertising contract.	NO
	A formal proposal for the O'Hare advertising contract was submitted to the city of Chicago *without mention or disclosure* of Bush's interest in the contract.	NO
	Bush spoke on several occasions with John Duba, the Deputy Mayor and informal "chairman" of the Committee responsible for evaluating and awarding the O'Hare concession contracts. At the first such conversation, Bush, in response to inquiry, told Duba that Dell Airport Advertising, Inc. was a reliable firm in the field of display advertising, that it was capable of carrying out a display advertising program at O'Hare, and that it was experienced in preparing displays. *Bush did not disclose his ownership of Dell Airport Advertising, Inc. to Duba.*	NO
	Duba recommended to Mayor Daley that Dell Airport Advertising, Inc. be awarded the O'Hare advertising contract. In making the recommendation, Duba considered Dell Airport Advertising's experience, the aesthetics of the proposed displays, the fact that Dell Airport Advertising, Inc. was a local company, the amount of money that Dell Airport Advertising, Inc. guaranteed to the city and the fact that Bush had recommended Dell Airport Advertising, Inc. In giving the recommendation, however, Bush did not specifically request that the contract be awarded to Dell Airport Advertising, Inc. or ask for any special treatment.	NO

Date	The Seventh Circuit's Factual Summary	Was Use of the Mails Charged?
1961:	Following Duba's recommendation to the Mayor, William Downes, the Aviation Commissioner, recommended to the Chicago City Council that Dell Airport Advertising, Inc. be awarded the O'Hare display advertising contract. On November 1, 1961, the City Council approved the awarding of the contract to Dell Airport Advertising, Inc.	NO
1966:	Bush met with Commissioner Downes at O'Hare, during which meeting Bush and Downes discussed the appropriateness of placing an automobile display at a certain location in the airport terminal. Bush responded that he thought the automobile display was a good idea, that it would make the location where it was to be placed more attractive, and that it probably would be a good revenue producer. Bush also stated, "But I have no ideas of telling you this is good because it is a good revenue producer, because I have no connection whatsoever with the company."	NO
	The Dell Airport Advertising, Inc. contract with the City of Chicago expired.	NO
1967:	The City Council voted to enter into another contract with Dell Airport Advertising, Inc. for the O'Hare advertising.	NO
1969-1973:	Dell Airport Advertising, Inc., *a company fully owned by Earl Bush and of which Bush was sole shareholder*, paid dividends to the **"Earl Bush Trust"** held by Sebat Co. (Sears Bank and Trust Co.). Dell Airport Advertising, Inc. sent the checks to its attorney, Sidney Drury, who sent them to the banker in charge of the "Earl Bush Trust" with deposit instructions. Bush was informed of the transfer by courtesy copy of the transmittal letters. *At the time the dividends were paid to Bush, the respective proceeds of the contract with the City had already been committed to, paid to and received by Earl Bush* (Dell Airport Advertising, Inc.).	CHARGED MAILINGS
1972-1973:	Bush failed to disclose to Mayor Daley his ownership of Dell Airport Advertising, Inc., although he disclosed the information to the Cook County Clerk as required by law.	NO

The Seventh Circuit, in its opinion, stated:

> "What makes this case so difficult is perhaps the subtlety of the scheme in which Bush was engaged. *There is no concrete evidence of extortion, bribery, kickbacks, or a violation of any criminal law other than the mail fraud statute.*" (Op. at 8, emphasis supplied)

The assessment by the Seventh Circuit is erroneous in two respects. First, there is *no* evidence of any of those crimes. Second, there is no violation of the mail fraud statute in this case. Assuming, *arguendo,* that Petitioner Bush took part in a scheme which he labeled "fraudulent", the Government failed to sufficiently connect that scheme with the use of the mails.

Last year, this Court, in *United States* v. *Maze,* 414 U.S. 395 (1974) held that where the mailing charged is not a necessary part of the transaction which led to a defendant's receipt of monies fraudulently claimed and obtained, a mail fraud conviction cannot stand.

In *Maze,* credit card sales slips, which reflected proceeds fraudulently obtained through the use of a stolen credit card, were transmitted by mail to a bank, which subsequently mailed them, along with bills, to the lawful owner from whom the credit card had been fraudulently obtained.

Mr. Justice Rehnquist, speaking for the *Maze* court, stated:

> "Congress could have drafted the Mail Fraud Statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it does not do this; instead, it required that the use of the mails

> be 'for the purpose of executing such a scheme or artifice . . .'" (94 S. Ct. at 650-51).[6]

The *Maze* Court found that the mailings therein, rather than postponing complaint to the authorities and delaying defendant's apprehension, increased the probability that respondent would be detected and apprehended. The *Maze* Court further stated:

> "We believe that under our decision the Mail Fraud Statute remains a strong and useful weapon to combat those evils which are within the broad reach of its language. If the Federal Government is engaged in combat against fraudulent schemes not covered by the

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[6] **Conflict between the Circuits:**

This Court, as a demonstration of its intent to stand by the principles enunciated in *Maze,* has reversed and remanded the following decisions: *United States* v. *Giotti,* 94 S. Ct. 907 (1974) (Third Circuit's affirmance of a mail fraud conviction for fraudulent use of a credit card); *United States* v. *Miles,* 94 S. Ct. 1553 (1974) (Eighth Circuit's affirmance of a mail fraud conviction for fraudulent schemes to obtain cattle by use of no-account check and then to dispose of cattle before check could clear); *United States* v. *Osher,* 94 S. Ct. 1554 (1974) (Second Circuit's affirmance of a mail fraud conviction for fraudulent use of a credit card).

The Fifth Circuit, in *United States* v. *Gardner,* 490 F. 2d 840 (5th Cir., 1974), withheld its opinion pending the *Maze* outcome and in light of *Maze* reversed a mail fraud conviction for the fraudulent use of a credit card, also abrogating its prior precedent in *United States* v. *Thomas,* 429 F. 2d 407 (5th Cir., 1970).

In another recent decision under *Maze, United States* v. *Holmes,* 390 F. Supp. 1077 (W.D. Mo., 1975), Judge John W. Oliver Jr. dismissed a five-count indictment charging wire fraud. In *Holmes,* a telephone company employer, who had purloined money from customers wishing to purchase telegraph company orders transferred the proceeds via wire. Analogizing to the body of congressional history and judicial precedent regarding the mail fraud statute, Judge Oliver relied on *Maze* and held that **a defendant's subsequent transfer of funds already received pursuant to the scheme cannot be said to have been done "for the purpose of executing" the fraudulent scheme or artifice.**

statute, *it must be at the initiative of Congress* and not of this court." (94 S. Ct. at 651 n. 10).

The *Maze* Court reaffirmed its carefully determined precedent in *Parr* v. *United States,* 363 U.S. 370 (1970) and *Kann* v. *United States,* 323 U.S. 88 (1944), wherein it had held that if the fraudulent scheme has been consummated by the time the mailing has occurred, even if the mailing is a direct result of the scheme, there is no mail fraud violation. The holdings require that the mails be a part of the scheme and be utilized in furtherance of the scheme, or as a means of avoidance of detection rather than being merely incidental to any scheme. As this Court stated in *Kann*:

> [t]he scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them or to any consummation of the scheme how the bank which paid or credited the check would collect from the drawee bank. (323 U.S. at 94)

In this case, the mailings charged in no way enabled Bush to "forestall discovery" or "delay detection of the scheme". *On the contrary, the mailings transferred checks from Bush's own company (owned solely by Bush), to the "Earl Bush Trust."* Such transfers could only serve to bring attention to Bush's ownership of Dell, and thus acted to reveal, rather than conceal, any alleged crime. As important is the fact that by the time these checks were issued and mailed, the respective proceeds of the alleged scheme already had been committed to, paid to and received by Bush, as the sole owner of Dell Airport Advertising, Inc.[7]

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[7] **Conflict within the Seventh Circuit:**

In other Seventh Circuit cases *before other Panels*, the *Maze* ruling has not gone unheeded. The Panel's decision in the in-

(footnote continued on following page)

Here, the mailings charged are unrelated to Bush's nondisclosure of his interest and relate only to Bush's own transfer of the funds to his personal trust account. Certainly these mailings cannot serve to bring the alleged conduct within the ambit of Section 1341.

Assuming, *arguendo,* that Petitioner Bush caused to be made the mailings charged in this indictment, it is clear that those mailings were not for the purpose of obtaining from the City the proceeds of the alleged scheme, since Petitioner already had received whatever proceeds he was entitled to under the contract. Moreover, the mailings charged served neither to delay discovery of the purported scheme nor to allow Bush to reap any benefits. Accordingly, this conviction should be reversed.

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stant case cannot satisfactorily be reconciled with other quite recent Seventh Circuit decisions.

First, in *United States* v. *Staszcuk*, 502 F. 2d 875 (7 Cir., 1974), the Panel, in reversing convictions on four mail fraud counts, ruled that mailed notices sent to building occupant concerning proposed zoning changes were not sufficiently connected to defendant Staszcuk's scheme to receive money in exchange for his vote approving such changes. This *Staszcuk* holding, which withstood review by the entire Circuit, sitting *En Banc* (517 F. 2d 53, 7th Cir., 1975), was based on the Court's reasoning that the mailing must be "real and proximate, not merely abstract or remote," and that "a use of the mails not a step toward receipt of the fruits of the scheme is not covered by Section 1341." (502 F. 2d at 880)

Next, in *United States* v. *Strauss*, 516 F. 2d 980 (7 Cir., 1975), in response to a Section 2255 petition attacking the validity of defendant Strauss' mail fraud conviction and sentence, which previously had been affirmed by the Seventh Circuit (at 452 F. 2d 375), the Government confessed error. *Strauss* involved a check-kiting scheme wherein the mailings involved were advice letters concerning the bank collection process. Notwithstanding the Government's confessed error, this Court proceeded to analyze, independently, the *Strauss* facts, and concluded that the mailings were "not for the purpose of conducting . . . any scheme." (516 F. 2d at 986). In *Strauss*, as in this *Bush* case, the entire alleged scheme was conducted without the use of the mails.

II.

IN APPLYING THE FEDERAL MAIL FRAUD STATUTE TO PETITIONER BUSH'S CONDUCT, THE SEVENTH CIRCUIT HAS INTERPRETED THAT STATUTE IN A MANNER SO NOVEL AND UNPREDICTABLE AS TO:

(A) DEFINE AS "A CRIME" CONDUCT WHICH WAS NOT FORESEEABLY CRIMINAL WHEN COMMITTED, THEREBY VIOLATING THIS COURT'S OFT-ARTICULATED PRINCIPLE THAT NO PERSON SHALL BE HELD CRIMINALLY RESPONSIBLE FOR CONDUCT WHICH HE COULD NOT REASONABLY HAVE UNDERSTOOD TO BE PROSCRIBED;

(B) CREATE EX POST FACTO "JUDICIAL LEGISLATION" IN CLEAR VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS AS WELL AS HIS CONSTITUTIONAL RIGHTS UNDER ARTICLE I, SECTION 10.

Petitioner Bush's conviction of mail fraud, and the Seventh Circuit's affirmance thereof, constitutes a virtual *coup d'etat* by that Federal Circuit Court over the federal legislative branch and state government and judiciary. The Indictment[8] in this case is invalid on its face because, while implying a violation of a moral or ethical duty to disclose, it charges no crime legislated by the federal government. (The Seventh Circuit itself recognized, in its Opinion, that no state law was violated [Op. at 8]).

Petitioner's conviction for mail fraud and the Seventh Circuit's affirmance violates the underlying principle of criminal liability that no man shall be criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States* v. *Hums*, 347 U.S. 612

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[8] The indictment, in pertinent part, is set forth in footnote 1, *supra*.

(1953); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1925).

If Congress intended, by Section 1341, to prohibit the conduct engaged in by Petitioner Bush as alleged in the indictment, then the statute on its face is vague, uncertain and fails to give notice of the conduct sought to be prohibited. See *United States* v. *Reese*, 92 U.S. 214 (1875). If, however, the intention of Congress is clear, then the Seventh Circuit's interpretation of that statute as prohibiting Bush's conduct constitutes so novel and unforeseeable an interpretation of the Mail Fraud Statute as to declare Bush's conduct illegal *ex post facto*. In view of the Federal government's recent attempts to expand the application of the mail fraud statute, this Court should seek to avoid an overbroad expansion of the Act to cover conduct that, as here, does not violate any other law and is not on its face fraudulent.

Perhaps no clearer statement exists of this Court's proscription of convictions based upon vague statutes than that set forth in *United States* v. *Cardiff*, 344 U.S. 174 (1952):

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula.

See also *Robe* v. *Washington*, 405 U.S. 313 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972).

In this case both the trial court and the Seventh Circuit have overlooked the requirement that, unlike regulatory statutes:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 at 340 (1951).

Petitioner Bush vigorously contends that nothing in Section 1341 gives notice to a person of ordinary intelligence that an appointed City employee's stock interest in a company that deals with the City, in the absence of disclosure of the employee's interest where no legal obligation to disclose exists, constitutes *per se*, a "scheme or artifice to defraud."

By applying the mail fraud statute in this case while admitting that the record is devoid of any other violation of any criminal law, the Seventh Circuit has defined a new and unsupported standard for criminal liability. The Opinion states that "[t]he totality of Bush's actions show that he did violate federal law and throughout the years he was engaged in a conscious effort to hide his activities". (Slip Op. at 8) But the only federal law the Seventh Circuit found to be violated was the mail fraud statute, which itself does not speak to any duty of disclosure of an interest such as Bush held in DAAI. The authorities relied upon by Petitioner hold that the element of *intent to defraud* is required for a mail fraud conviction, not merely the intent to *hide* his actions that otherwise are perfectly legal. See *United States* v. *Regent Office Supply Co.*, 421 F. 2d 1174 (2d Cir. 1970), *United States* v. *George*, 477 F. 2d 508 (7th Cir. 1973). In *George*, the court plainly stated: "The critical element is fraudulent intent."

The Seventh Circuit, in its own words, has created law based on a "hybrid situation linking some of the pure business fraud aspects of *United States* v. *George*, *supra* with the use of public office for profit considerations of *United States* v. *Isaacs*, [493 F. 2d 1124 (7th Cir. 1974)] *supra*". (Slip Op. at 8-9) The mail fraud violations in those cases plainly involved a defendant's receipts of bribes or kickbacks. There were definite acts in *George* and *Isaacs* showing a specific intent to defraud as well as definite benefits deprived by the fraud. Here, however, the uncontradicted testimony showed that the City's contract with DAAI was the best of any city in the country. Moreover, Bush did not receive any benefit *as a result of* his position as Press Secretary to Mayor Daley. Bush's interest in DAAI was a purely business arrangement that was not itself illegal and could not become illegal without legislation. The Seventh Circuit's *speculation* concerning possible benefits to the City of increased revenue if Bush's interest had been disclosed is not supported by any evidence on the record.

Although the Seventh Circuit paid lip service to its own warning in *George* that "not every breach of a fiduciary duty works a criminal fraud" (Slip Op. at 9), it went on to conclude that Bush materially misrepresented his interest. However, the only evidence of a misrepresentation of Bush's interest was in the report to the official that appointed him and fired him, Mayor Daley. There was full disclosure to the IRS and to the County Clerk as required by to the Illinois Governmental Ethics Act. Surely, the effect of a non-disclosure or even an outright lie to one's official superior cannot be the basis for *criminal sanctions* in the absence of a statutory requirement that he so disclose.

None of the authorities relied upon by the government or by the Seventh Circuit involved a non-elected public employee charged with defrauding the public of its loyal services. Rather, the cases cited as authorities by the govern-

ment and the Seventh Circuit involve bribery, kickbacks, or other violations of law. Therefore, each so-called "authority" easily is distinguished from this case.

Prior to this *Bush* case, there has never been a mail fraud prosecution of a *non-elected* public employee for defrauding the public, in general, of their right to conscientious performance of official duties, *which conduct admittedly did not involve a violation of the criminal law.* Could Petitioner have even guessed in 1961 that a court of review would interpret the law in such a novel, sui generis, utterly unforeseeable manner as it has in this case? The decision in the case at bar amounts to no less than *ex post facto* judicial interpretation *and* affirmance of that novel interpretation!

When a court decision interprets an existing criminal law in an unforeseeable manner affirming a criminal conviction, that judicial interpretation violates the guarantees of Article I, Section 10 and the Fifth Amendment of the Constitution prohibiting the passage of *ex post facto* laws.

In *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964) this Court reaffirmed the principle that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of statutory language.

The *Bouie* Court held:

> *Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law,* such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates a crime,* or makes it *greater* than it was, when committed." If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. *The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.* If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. (378 U.S. at 353-54, emphasis supplied, citations omitted)

In this case, there is no precedent to support the Seventh Circuit's new interpretation of law. Petitioner Bush was prosecuted, and convicted for a "crime" that was not a crime when he allegedly committed it. Such judicial construction clearly is prohibited under *Bouie* v. *City of Columbia,* and the long line of authority on which it rests.

Clearly, this Court should review the critical difference between acts that constitute cognizable crimes or statutory violations, on the one hand, and the vague and undefined standards of conduct that the Seventh Circuit's opinion implies can now result in criminal penalties with "no concrete evidence of extortion, bribery, kickbacks or a violation of any criminal law. . . ." In fact, there is no evidence here at all—concrete or otherwise—of any violation. The imposition on Bush, or any other citizen, of criminal liability where no affirmative criminal acts were done in conjunction with the use of the mails would subject not only every elected or appointed official, but every citizen, to the whims and changing standards of morality of a government that otherwise has completely failed to define standards of con-

duct by statute. *If this case is allowed to stand, any public official, judge or appointed governmental employee, such as Bush, who has kept his personal financial affairs private, will be exposed to the government's charge of a crime without any showing of fraudulent intent or actual fraud.*

Such exposure to criminal liability in the absence of notice and standards of conduct is manifestly unfair. Earl Bush's conviction, we submit, is fatally defective and should be reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

SAM ADAM
EDWARD M. GENSON
THEODORE M. BECKER
J. SAMUEL TENENBAUM
134 N. LaSalle Street
Suite 300
Chicago, Illinois 60602
(312) 236-5543

Attorneys for Petitioner

A-1

APPENDIX A

LAW OFFICES

BERGER, NEWMARK & FENCHEL

WILLIAM B. BERGER
LAWRENCE S. NEWMARK
MARVIN S. FENCHEL
ERVIN FEUERSTEIN
BARRY S. ELMAN
ROBERT W. HANLY
HARRY D. LAVERY
JULIUS H. SHAPIRO
SIDNEY H. DRURY
PHILIP COWAN
ARNOLD H. RUSKIN
MICHAEL L. LAPIN
KENT WESTLEY

TELEPHONE STATE 2-6060

1971 JAN 19 AM 8:52

10 SOUTH LA SALLE STREET
CHICAGO 60603

January 18, 1971

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Sears Bank and Trust Company
Homan and Arthington Streets
Chicago, Illinois 60624

Attention: Mr. John Carbery

Re: Earl Bush Trust

Dear John:

Enclosed herewith please find check of Dell Airport Advertising, Inc., dated January 14, 1971, in the amount of $6,000.00, payable to Sebat Co. representing dividend payment for the 4th quarter of 1970, to be credited to the above Trust.

Cordially,

BERGER, NEWMARK & FENCHEL

By
Sidney H. Drury

SHD:ed
Encl

cc: Earl Bush

GOVERNMENT EXHIBIT 8-1

A-2

12102

LAW OFFICES
BERGER, NEWMARK & FENCHEL

WILLIAM B. BERGER
LAWRENCE S. NEWMARK
MARVIN S. FENCHEL
ERVIN FEUERSTEIN
BARRY D. ELMAN
HARRY D. LAVERY
JULIUS H. SHAPIRO
SIDNEY H. DRURY
PHILIP GORMAN
ROBERT W. MANLY
ARNOLD H. RUBIN
EARL B. LICHTEN
KENT H. WESTLEY
KENNETH A. LATINER

TELEPHONE STATE 2-6080

10 SOUTH LASALLE STREET
CHICAGO 60603

July 6, 1971

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Sears Bank and Trust Company
Homan and Arthington Streets
Chicago, Illinois 60624

Attention: Mr. John Carbery

Re: Earl Bush Trust

Dear John:

Enclosed herewith please find check of Dell Airport Advertising, Inc., #2121, dated July 2, 1971, in the amount of $8,000.00, payable to Sebat Co. representing dividend payment for the second quarter of 1971, to be credited to the above Trust.

Cordially,

BERGER, NEWMARK & FENCHEL

By Sidney H. Drury

SHD:ed
Encl

cc: Earl Bush
8449 N. Laramie
Skokie, Illinois

GOVERNMENT EXHIBIT 8-2

A-3

12102 1 Inc

LAW OFFICES
BERGER, NEWMARK & FENCHEL

WILLIAM B. BERGER
LAWRENCE S. NEWMARK
MARVIN S. FENCHEL
ERVIN FEUERSTEIN
BARRY D. ELMAN
HARRY D. LAVERY
JULIUS H. SHAPIRO
SIDNEY H. DRURY
PHILIP GORMAN
ROBERT W. MANLY
ARNOLD H. RUBIN
EARL B. LICHTEN
KENT H. WESTLEY
KENNETH A. LATINER

TELEPHONE STATE 2-6080

10 SOUTH LASALLE STREET
CHICAGO 60603

January 17, 1972

CERTIFIED MAIL
RETUEN RECEIPT REQUESTED

Sears Bank and Trust Company
Homan and Arthington Streets
Chicago, Illinois 60624

Attention: Mr. John Carbery

Re: Earl Bush Trust

Dear John:

Enclosed herewith please find check of Dell Airport Advertising, Inc., dated January 12, 1972, in the amount of $5,000.00, payable to Sebat Co., representing dividend payment for the fourth quarter of 1971, to be credited to the above Trust.

Cordially,

BERGER, NEWMARK & FENCHEL

By Sidney H. Drury

SHD:ed
Encl

cc: Mr. Earl Bush
8449 North Laramie
Skokie, Illinois

GOVERNMENT EXHIBIT 8-3

BEST COPY AVAILABLE

121021

A-4

TELEPHONE STATE 2-6060

LAW OFFICES

ERGER, NEWMARK & FENCHEL

.LIAN S. BERGER
WRENCE S. NEWMARK
.RVIN S. FENCHEL
VIN FEUERSTEIN
.RRY D. ELMAN
.RRY D. LAVERY
.LIUS M. SHAPIRO
DNEY H. DRURY
.LIP GORMAN
.BERT W. HANLY
.NOLD M. RUBIN
.EL S. LICHTEN
.NT M. WESTLEY
:NNETH A. LAPINSKI

10 SOUTH LA SALLE STREET
CHICAGO 60603

June 19, 1972

Sears Bank and Trust Company
Homan and Arthington Streets
Chicago, Illinois 60624

ATTENTION: MR. JOHN CARBERY

RE: EARL BUSH TRUST

Dear John:

Enclosed herewith please find check of Dell Airport Advertising, Inc. dated June 16, 1972, in the amount of $8,000.00 payable to Sebat Co. representing a dividend payment for the second quarter of 1972, to be credited to the above trust.

Cordially yours,

BERGER, NEWMARK & FENCHEL

Sidney H. Drury

SHD:cjb

Enclosure

cc: Mr. Earl Bush

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

GOVERNMENT EXHIBIT 8-4

121021

A-5

TELEPHONE STATE 2-6060

LAW OFFICES

GER, NEWMARK & FENCHEL

. S. BERGER
.CE S. NEWMARK
S. FENCHEL
"EUERSTEIN
D. ELMAN
D. LAVERY
M. SHAPIRO
M. DRURY
GORMAN
" W. HANLY
M. RUBIN
.LICHTEN
.WESTLEY
"M A. LAPINSKI

10 SOUTH LA SALLE STREET
CHICAGO 60603

January 15, 1973

Certified Mail
Return Receipt Requested

Mr. John Carberry
Sears Bank & Trust Company
Homan & Arthington Streets
Chicago, Illinois 60624

Re: Earl Bush Trust

Dear John:

Enclosed herewith please find the check of Dell Airport Advertising, Inc., #2223 dated January 11, 1973 in the amount of $10,000.00 payable to Sebat Co., which check represents the dividend payment for the fourth quarter of 1972 to be credited to the above trust.

SEARS BANK & TRUST CO
TRUST DEPT.
RECEIVED
1973 JAN 16 AM 8:15
ADMINISTRATION
INVEST
OPTIONS

Cordially,

BERGER, NEWMARK & FENCHEL

By Sidney H. Drury

SHD/cb

Enclosure

cc: Mr. Earl Bush

GOVERNMENT EXHIBIT 8-5

DELL AIRPORT ADVERTISING INC.
1017 W. WASHINGTON BOULEVARD · CHICAGO, ILLINOIS 60607 · AREA 312 666-0701

September 30, 1969

Mr. Sidney H. Drury
Berger, Newmark & Fenchel
10 South La Salle Street
Chicago, Illinois 60603

Re: Dell Airport Advertising Inc.
Stock Dividend

Dear Sid:

Enclosed is third quarter dividend payment in the amount of $4,000.00 from Dell Airport Advertising Inc., for the current year of 1969.

This dividend is issued to Sebat Co., per corporate records.

Very truly yours,

DELL AIRPORT ADVERTISING INC.

John A. Dell
President

JAD:mk

Enc: Check

GOVERNMENT EXHIBIT 1-44

DELL AIRPORT ADVERTISING INC.
2701 UNITED LANE · ELK GROVE VILLAGE, ILLINOIS 60007 AREA 312 [illegible]

VE OFFICES

October 23, 1970

Mr. Sidney H. Drury
Berger, Newmark & Fenchel
10 South La Salle Stroet
Chicago, Illinois 60603

Re: Dell Airport Advertising Inc.
Quarterly Dividend Payment

Dear Mr. Drury:

Enclosed is third Quarter Dividend payment in the amount of $6,000.00 from Dell Airport Advertising, Inc. for the current year of 1970.

This dividend payment is issued to Sebat Co., per Corporate records.

Yours very truly,

DELL AIRPORT ADVERTISING INC.

John A. Dell
President

JAD:mk

Enc: Check

GOVERNMENT EXHIBIT 1-45

2/8/74 CR

DELL AIRPORT ADVERTISING INC.
2701 UNITED LANE • ELK GROVE VILLAGE, ILLINOIS 60007 AREA 312 595-0610

E OFFICES

April 13, 1971

1473-4

Mr. Sidney H. Drury
Berger, Newmark & Fenchel
10 South La Salle Street
Chicago, Illinois 60603

Re: Dell Airport Advertising Inc.
Quarterly Dividend Payment

Dear Mr. Drury:

Enclosed is First Quarter Dividend payment in the amount of $6,000.00 from Dell Airport Advertising, Inc. for the current year of 1971.

This dividend payment is issued to Sebat Co., per Coporate Records.

Yours very truly,

DELL AIRPORT ADVERTISING INC.

John A. Dell
President

JAD:mk

Enc: Check

GOVERNMENT EXHIBIT 1-46

2/12/77 CMD

DELL AIRPORT ADVERTISING INC.
2701 UNITED LANE • ELK GROVE VILLAGE, ILLINOIS 60007 AREA 312 595-0610

OFFICES

April 10, 1972

Mr. Sidney H. Drury
Berger, Newmark & Fenchel
10 South La Salle Street
Chicago, Illinois 60603

Re: Dell Airport Advertising Inc.
1972 First Quarter Dividend Payment

Dear Mr. Drury:

Enclosed is First Quarter Dividend payment in the amount of $10,000.00 from Dell Airport Advertising Inc., for the current year of 1972.

This dividend payment is issued to Sebat Co., per Corporate Resolution.

Yours very truly,

DELL AIRPORT ADVERTISING INC.

John A. Dell
President

JAD:mk

Enc: Check

GOVERNMENT EXHIBIT 1-47

2/8/79 SMC

DELL AIRPORT ADVERTISING INC.
2701 UNITED LANE • ELK GROVE VILLAGE, ILLINOIS 60007 AREA 312 [illegible]

OFFICES

October 4, 1972

Mr. Sidney H. Drury
Berger, Newmark & Fenchel
10 South La Salle Street
Chicago, Illinois 60603

Dear Mr. Drury:

Enclosed is Third Quarter Dividend payment in the amount of $12,000.00 from Dell Airport Advertising Inc., for the current year of 1972.

This dividend payment is issued to Sebat Co., per corporate resolution.

Yours very truly,

DELL AIRPORT ADVERTISING INC.

John A. Dell
President

JAD:mk

Enc:

GOVERNMENT EXHIBIT 1-48

2/13/74 SMA

BEST COPY AVAILABLE

DELL AIRPORT ADVERTISING INC.
POST OFFICE BOX 66248 • AMF O'HARE AIRPORT • CHICAGO, ILLINOIS 60666 • AREA 312 - 686-

July 1, 1969

Commissioner William E. Downes, Jr.
Department of Aviation
City of Chicago
Chicago, Illinois 60602

RECEIVED
JUL -9 1969
AIRPORT MANAGER O'HARE FIELD

Re: Chicago O'Hare International Airport
Hotel-Motel Reservation Advertising

Dear Commissioner Downes:

We shall appreciate your consideration and approval for us to remodel and change our existing advertising displays covering four Hotel-Motel reservation centers at Chicago O'Hare International Airport.

Each present center has six tables containing (24) advertising spaces which are now located on the lower level at each end of each terminal building #2 and #3.

At the present time, all of the available floor space is being utilized to accommodate the above reservation centers, therefore, we cannot further expand these centers. With the influx of new hotels and motels being built, along with the continual increase of passenger traffic, we have now concluded we should abandon the existing form of advertising display and create a new more compact type which can accommodate more advertising locations within the same allotted floor space.

Enclosed is a photograph which depicts our general concept of the type display table we propose constructing. We anticipate installing two such tables at each existing location. This would then enable us to serve up to a maximum of (48) clients, which should be quite ample for future growth.

Your approval is urgently requested in order that we may formulate our plans and construction.

RECEIVED
JUL 2 1969
COMMISSIONER OF AVIATION

Sincerely,

John A. Dell

JAD:tg
enc.

APPENDIX B
In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1969

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EARL BUSH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 CR 458.
PHILIP W. TONE, *Judge.*

ARGUED MAY 21, 1975 — DECIDED SEPTEMBER 4, 1975

Before SPRECHER, BAUER, *Circuit Judges,* and EAST, *Senior District Judge.**

BAUER, *Circuit Judge.* Defendant-appellant, Earl Bush, was charged in an eleven count indictment with violations of the mail fraud statute, 18 U.S.C. §1341.[1] Following a

* The Honorable William G. East, Senior District Judge, District of Oregon, is sitting by designation.

[1] 18 U.S.C. §1341, states, *inter alia*:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Services, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

jury trial, Bush was convicted on all counts. The trial judge imposed concurrent one year terms of incarceration upon each count.

Earl Bush served as Press Secretary and Director of Public Relations for Mayor Richard J. Daley from 1955 to 1973. During that period he was also the owner of Dell Airport Advertising, Inc. ("DAAI"), which held the exclusive contract with the City of Chicago for display advertising at Chicago's O'Hare International Airport.

Essentially, the indictment alleged that Bush, as owner of DAAI at the time he was employed by the City of Chicago, engaged in a scheme to deprive the citizens of Chicago, its mayor, officials and employees, of his loyal and faithful services as a city employee, the honest administration of the city's business, and information material to the decisions which the city's officials were required to make in conducting the city's business. The indictment also charged that Bush schemed to obtain money, property and other things of value by false representations.

The primary thrust of Bush's appeal to this Court is that by a misapplication of the mail fraud statute and erroneous jury instructions, he believes he was improperly and unfairly convicted of a non-crime. In order to consider arguments by both sides dealing with the applicability of the mail fraud statute we must carefully review the factual record.

In the latter part of 1961 and early 1962, a new terminal, runways and other facilities were under construction at O'Hare Field, which was to be Chicago's first jet airport. To facilitate the completion and the opening of the airport, Mayor Daley established a small informal committee to negotiate contracts for the concessions operations at O'Hare. The committee consisted of John Duba, Deputy Mayor, William Downes, Commissioner of Aviation, and John Melaniphy, Corporation Counsel. Although not formally appointed, John Duba was assumed to be the committee's chairman.

In 1961 Bush's company[2] entered into a joint venture agreement with Dell Displays, Inc.[3] for the negotiation

[2] At this time Bush's company was known as Terminal Art, Inc. DAAI was the successor corporation to Terminal Art, Inc.

[3] Dell Displays, Inc. was owned by John and Robert Dell.

and service of an airport advertising contract with the City of Chicago. The joint venture agreement provided that John and Robert Dell would do the advertising work at O'Hare Airport and that Bush's company (DAAI) would hold the contract with the city. The services Bush performed were minimal. Although he originally developed the advertising concept of a three-dimensional shadow box display case, the idea on which the contract was based, the Dells were to design the displays, sell them and find locations for them in the airport. The Dells assumed that Bush's contribution, in addition to the originating of the shadow box design, would be to promote the contract.[4]

In the fall of 1961, as preparations were being made to submit a proposal to the City of Chicago for the display advertising concession at O'Hare, Bush had a conversation with Robert Dell concerning the use of his name in seeking the contract. Bush told Dell that his (Bush's) name should never be used in connection with any work regarding the airport contract. Subsequently, Bush introduced Robert Dell to William Downes, the Commissioner of Aviation. Neither at the time of the introduction nor at any later date did Bush advise Downes of his substantial interest in the advertising contract at the airport. When the formal proposal for the O'Hare advertising contract was submitted to the City of Chicago there was no mention or disclosure of Bush's interest in the contract.

Prior to the time that the display advertising concession contract for O'Hare was to be awarded, Bush several times spoke to John Duba, the Deputy Mayor and the informal chairman of the committee responsible for evaluating and awarding the O'Hare concession contracts, concerning the DAAI proposal. The first conversation between Duba and Bush regarding DAAI occurred in the summer or fall of 1961. At that time, Bush told Duba that DAAI was a reliable firm in the field of display advertising, that it was capable of carrying out a display advertising program at O'Hare, and that it was experienced in preparing displays. Two other similar conversations occurred during the summer or fall of 1961. At no time did Bush disclose to Duba that he had any interest in DAAI.

[4] The defendant contends that it is a misstatement of the evidence to take the position that it was Bush's responsibility to promote the contract. We have reviewed the record very closely on this point and believe that the jury could have properly reached that conclusion, especially in light of Dell's testimony at p. 118-9 of the trial transcript.

Late in 1961, Duba recommended to Mayor Daley that DAAI be awarded the display advertising contract at O'Hare. In making that recommendation, Duba considered DAAI's experience, the aesthetics of the proposed displays, the fact that DAAI was a local company, the amount of money that DAAI guaranteed to the city and the fact that Bush had recommended DAAI. Duba placed great weight on Bush's recommendation because of Bush's expertise in the field of public relations and advertising. In giving the recommendation, however, Bush did not specifically request that the contract be awarded to DAAI or ask for any special treatment.

Folowing Duba's recommendation to the mayor, William Downes, the Aviation Commissioner, recommended to the Chicago City Council that DAAI be awarded the O'Hare display advertising contract. On November 1, 1961, the City Council approved the awarding of the contract to DAAI.

In 1966, DAAI's contract with the City of Chicago expired. However, it was renewed on October 4, 1967 after renewal was recommended by the mayor and the commissioner of aviation. Prior to the renewal of the contract, however, Bush met with Commissioner Downes at O'Hare in approximately July, 1966. At that meeting, Bush and Downes discussed the appropriateness of placing an automobile display at a certain location in the airport terminal. Downes asked Bush for his judgment concerning the display. Bush responded that he thought the automobile display was a good idea, that it would make the location where it was to be placed more attractive, and that it probably would be good revenue producer. Bush also stated, "But I have no ideas [sic] of telling you this is good because it is a revenue producer, because I have no connection whatsoever with the company."

Between the time the city awarded the display advertising contract to DAAI in 1962 and the time the contract

was renewed in 1967, Bush received $40,000 from DAAI. None of that money, however, went directly to him. Rather, DAAI checks, the proceeds of which were intended for Bush, were made payable to Information Consultants. The checks were sent to Arnie Matanky, a friend of Bush's who owned Information Consultants; and Matanky deposited each check in the Information Consultants' bank account. For each DAAI check received and deposited, Matanky would make out an Information Consultants' check payable to Earl Bush in the same amount as the DAAI check. Information Consultants never did any work or performed any services for DAAI and it never retained any of the money it received from DAAI. All of the money received was passed on to Bush.

As of approximately June, 1966, Bush's DAAI stock was still being held in the names of nominees. Sometime between June and September, 1966, Bush's attorney advised him that the stock should no longer be held by nominees. Bush responded that he knew the stock was being held by nominees and did not want it registered in his own name. On advice of legal counsel, Bush decided to establish a trust, and, on February 22, 1967, Bush's DAAI stock was transferred to Sebat Co., the nominee for Sears Bank & Trust Company. Bush was the settlor and income beneficiary of the trust and Sears Bank & Trust Company was the trustee. Bush had complete control over the transactions of the trust.

Shortly after the creation of the trust, DAAI, for the first time, began to pay dividends to Bush, its sole shareholder. The first dividend was paid in July, 1967. As with the earlier monies sent to Bush by DAAI, the proceeds of the DAAI dividend checks reached Bush by circuitous means. Thus, DAAI sent its dividend checks, made payable to Sebat Co., to Bush's attorney, Sidney Drury. Without making any bookkeeping entries or otherwise processing each check, Drury would then transmit each check to John Carbery, vice-president and trust officer at the Sears Bank & Trust Company. Each check so received by Carbery was then deposited into Bush's trust account. Between July, 1967, when DAAI first began paying dividends, and July, 1973, Bush received $162,000 from DAAI.

From the inception of his tenure as Mayor, Richard Daley established and disseminated to department heads

and members of his staff, including Bush, certain standards of conduct. One of these standards was that every department head and staff member was prohibited from using his position as an employee of the City of Chicago to benefit personally. To emphasize this policy, Mayor Daley in 1972 required that all of his department heads and staff members who were required by law to file statements of economic interests with the Cook County Clerk file copies of such statements with the Mayor's Office. Bush was required by law, both in 1972 and 1973, to file statements of economic interests with the Clerk of Cook County.[8] Accordingly, he fell within those covered by the mayor's policy and, thus, was required to file copies of his interest statements with the Mayor's Office.

In June, 1972, Bush typed or caused to be typed a statement of economic interests. On that form, the word "none" was set forth in the places which called for disclosure of Bush's stock holdings in DAAI. Bush signed the statement and had it notarized. He then photocopied or otherwise duplicated that statement. Subsequently, Bush erased the words "none" which had been typed on the statement and in their place typed on a different typewriter the words "Dell Airport Advertising" and "stock." On June 29, 1972, Bush filed the altered document, which disclosed his DAAI interests, with the Office of the Cook County Clerk. He filed the photocopied or duplicated copy, which failed to disclose his DAAI interests, with the Mayor's Office.

On April 11, 1973, Bush filed a second statement of economic interests with the County Clerk's Office. Original typing appeared on the statement and in it Bush disclosed his DAAI interests. Bush also filed a statement of economic interests with the Mayor's Office, but that statement was not a copy or exact duplicate of the statement which he had filed with the County Clerk. Rather, it contained original typewriting and set forth the word

[8] 127 Ill.Rev.Stat. §604A-101 (Supp. 1973) provides, *inter alia*:
"The following persons shall file verified written statements of economic interests, as provided in this Article:
(i) Persons who are employed . . . by any unit of local government as defined by the Illinois Constitution, and are compensated for services as employees and not independent contractors at the rate of $20,000 per year or more. . . ."

"none" where "Dell Airport Advertising, Inc." and "stock" should have appeared. The typewriter which had been used to prepare the two 1973 statements was the same typewriter which had been used to type the alterations on Bush's 1972 statement.

In July, 1973, Mayor Daley met with Bush at City Hall. Mayor Daley had requested the meeting because he had read or heard of newspaper disclosures concerning Bush's ownership of DAAI. At that meeting Daley asked Bush whether there was any truth to the newspaper charges. After Bush admitted that the allegations were true, Daley dismissed him. Subsequently, when Mayor Daley testified that Earl Bush had served him for over twenty years to the best of his ability, he stated "he was a very fine employee." He further testified that the city still maintains the advertising contract with DAAI because the service from the display people and the compensation to the city was the best that any aviation facility has received in the United States.

I. DID THE DEFENDANT'S CONDUCT AMOUNT TO AN OFFENSE UNDER THE MAIL FRAUD STATUTE?

Defendant asserts that the mail fraud statute has no real application to the facts of this case; and, further, that no judicial authority has ever gone this far in extending the mail fraud statute. We agree that defendant Bush's conduct was not the typical scenario found in a mail fraud case. However, we remain convinced that the government did meet the mandate of the statute by demonstrating that Bush engaged in a scheme to defraud the mayor and the citizens of Chicago and that he used the mails in the furtherance of that scheme, and furthermore, that Bush had a specific intent to engage in the fraud.

In recent years in this Circuit and across the country it has become well established that the mail fraud statute is violated when some or all of the following factors are present: a duty to disclose an interest with a concomitant failure to do so; an attempt to cover-up through false pretenses; a taking of money or property or rights of another through the use of kickbacks, extortion, bribery,

tax evasion, perjury, or a violation of some state or federal statute; a use of the United States mails. See *United States* v. *Proctor & Gamble Co.*, 47 F.Supp. 676 (D.Mass. 1942); *United States* v. *Faser*, 303 F.Supp. 380 (E.D. La. 1969); *United States* v. *George*, 477 F.2d 508 (7th Cir.), *cert. denied* 414 U.S. 827 (1973); *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied* 417 U.S. 976 (1974); *United States* v. *Barrett*, 505 F.2d 1091 (7th Cir.), *cert. denied* 95 S.Ct. 1951 (1975); *United States* v. *Bryza*, No. 75-1215 (7th Cir., decided August ...., 1975). What makes this case so difficult is perhaps the subtlety of the scheme in which Bush was engaged. There is no concrete evidence of extortion, bribery, kickbacks, or a violation of any criminal law[6] other than the mail fraud statute. The totality of Bush's actions show that he did violate federal law and throughout the years he was engaged in a conscious effort to hide his activities.

Because of the multifaceted nature of the transactions the indictment was couched in language which charged that Bush engaged in a scheme to both defraud and to obtain money under false pretenses. Reduced to its essentials the indictment alleged that Bush defrauded the citizens of Chicago, the mayor, and the employees and officials of the city out of (1) their right to Bush's loyal and faithful services in his official capacity, (2) their right to have the city's business conducted honestly and impartially, and (3) their right to be aware of all pertinent facts when analyzing, negotiating, entering into and renewing contracts with persons and companies seeking to do business with the city; and, that as a result of this scheme, Bush obtained money and property in violation of §1341 because through fraudulent pretenses he was able to collect his salary from the city and his profits from DAAI at the same time. We think the record amply demonstrates that Bush committed the acts alleged in the indictment. The result is that this case presents a hybird situation linking some of the pure business fraud

[6] We note, however, that a conviction for mail fraud is not dependent upon a violation of state law. *United States* v. *States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 and 950 (1974); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied* 409 U.S. 891 (1972).

aspects of *United States* v. *George, supra,* with the use of public office for profit considerations of *United States* v. *Isaacs, supra* and *United States* v. *Barrett, supra.* The government and the defendant are locked in dispute over whether these precedents apply. A review of the cases does not indicate any previous factual situation which is squarely on point. *United States* v. *George, supra,* is perhaps the decision that is most apropos to the Bush case.

In *George* three defendants were indicted for mail fraud violations arising from a scheme in which Yonan, a buyer for Zenith Radio Corporation, received kickbacks from Greensphan, a supplier, through middle man George. The indictment charged that the scheme deprived Zenith of its lawful money and property and of the honest and faithful performance of its employee Yonan's duties.

Similarly in this case the indictment charged that one of the objects of the scheme was to deprive the City of Chicago, its mayor, officials and employees of the opportunity to bargain with all relevant facts in their possession. *George* fully recognized that such an allegation was sufficient to state an offense under §1341:

> "Not only did Yonan secretly profit from his agency, but also he deprived Zenith of material knowledge that Greensphan would accept less profit. There was a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it."

However, the defendant correctly points out that the *George* case involved more than a mere breach of a fiduciary duty or mere nondisclosure of a business interest. Critical factors cited were the employee's participation in the scheme in his employment capacity, and/or the existence of a duty to disclose imposed by statutory or similar law and a breach of such duty. Defendant reminds us of the warning in the *George* opinion that:

> "We need not accept the Government's far-ranging argument that anytime an agent secretly profits from his agency he has committed a criminal fraud. Not every breach of every fiduciary duty works a criminal fraud."

But we think that Bush did more than breach his fiduciary duty; he materially misrepresented his interests.

Bush was not making his recommendation merely as a disinterested public servant. His ownership of DAAI was material to the city officials' evaluation of Bush's opinion of the company which he was recommending. Moreover, as the trial judge observed in ruling on Bush's motion to dismiss the indictment, Bush's "statement that the company was 'reputable' without disclosing that it was the device by which the Mayor's Press Secretary secretly derived profits from a city contract was itself a material misrepresentation."

The information that Bush owned DAAI and would receive profits as a result of DAAI's city contract was information material to those city officials who were to evaluate and recommend a proposed contract and to those in the City Council who were to award a contract. That information was material to a decision as to whether to award the contract to DAAI and, if so, at what price. Assuming that the city would have been willing to do business with a company owned by Bush, the fact that Bush would be receiving profits as a result of the contract was material to the question of what percentage of DAAI's profits should be turned over to the city.

Bush was not responsible for awarding the O'Hare advertising contract, but he used his official position within the mayor's inner circle to exert the substantial influence which he had on those who were responsible for negotiating the contract. He did so without advising them that he was vitally interested in the contract or that his sole responsibility under the terms of the contract was to promote it. After the contract was awarded, Bush took steps to insure that the proceeds of the venture could not be traced to him, misrepresented his interest to assist in assuring that the contract would be renewed and filed false documents to continue his employment.

Bush's breach of fiduciary duty is important, however, in considering whether he deprived the city of his honest and faithful services. We believe that the mayor, the city, and most importantly, the citizens were deprived of those services. However, this alone could never be considered a crime under the mail fraud statute. It is only when his

failure to provide honest and faithful services is combined with his material misrepresentations to the mayor and John Duba and his active concealment that an illegal fraud occurs which is cognizable under §1341.

Much was said at trial about the fact that the city did not lose money on the contract and that it was one of the best in the country. However, that argument is not convincing. First of all, if the city had known of Bush's interest it might have been able to obtain a better contract. Secondly, the mail fraud statute seeks to prohibit fraudulent conduct regardless of ultimate loss or damage to the victims of the crime. *United States* v. *Reicin*, 497 F.2d 563 (7th Cir.), *cert. denied* 419 U.S. 996 (1974). Since 1961 Bush made a profit of over $200,000 from his hidden interest in the airport advertising contract. If the citizens of Chicago and other public officials had known of Bush's interest they could have rightfully negotiated an advertising contract which might have earned those profits for the city. The net result was that Bush, through his scheme, made a deal with the city by which the city profited. The deal may have been a good one for the city; the problem is that Bush deprived the city and its officials of making a better deal, of the best deal possible, in order that he might share in the profits. In *United States* v. *Barrett*, *supra*, this Court discussed this problem and viewed its prior opinion in *United States* v. *George*, *supra*, as controlling, stating that:

> "Despite the facts that the kickbacks did not 'come out of Zenith's pockets,' that the purchasing agent did not request any preferential treatment beyond receiving the cabinet business, that the supplier's prices to Zenith were fair and reasonable and within Zenith's general guidelines for its supplier's prices, that Zenith was never shown to be dissatisfied with the cabinet supplier's products or prices, and that the purchasing agent insisted on efficiency and quality from the supplier, nevertheless this court affirmed the conviction of the purchasing agent, supplier, and the third party under the mail fraud statute."

We need not express any opinion here on whether the mail fraud statute can be violated unless the victim(s) suffer some form of pecuniary injury, because we believe that the city in this case did suffer pecuniary injury.

In his argument that the mail fraud statute has no application to the facts of this case, defendant Bush also contends that the government totally failed to prove that Earl Bush had the requisite intent to commit criminal fraud. Mail fraud, like all other crimes arising out of deceit or deception, requires a specific criminal intent. The mail fraud statute proscribes any scheme utilizing the mails that is "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Blachly* v. *United States*, 380 F.2d 665, 671 (5th Cir. 1965). See also *United States* v. *Shavin*, 287 F.2d 647, 650 (7th Cir. 1961), *cert. denied* 375 U.S. 944 (1963); *Silverman* v. *United States*, 213 F.2d 405, 407 (5th Cir.), *cert. denied* 348 U.S. 828 (1954). Did Bush have the requisite intent to deceive persons of ordinary prudence and comprehension? We think he did. In fact there is evidence in the record that the mayor and members of the City Council were deceived. Indeed, Bush's course of conduct contained active steps to deceive. At trial explanations were offered for Bush's misrepresentations, his failure to disclose his interest in DAAI, his falsification of his statements of economic interest filed with the mayor, his use of multiple nominees, conduits for payments, and a numbered trust account to hide his ownership. The jury could have considered all these actions as weighing heavily against the defendant and thus found the exculpatory evidence to be pale in comparison. It is reasonable to conclude that Bush had the necessary criminal intent from the totality of his actions.

II. THE INDICTMENT WAS NOT PREJUDICIALLY DUPLICITOUS.

Defendant Bush argues that each of the mail fraud counts in the indictment was duplicitous and is therefore fatally defective; that the critical prejudice to Bush here is that the jury members could have had divided views as to Bush's scheme and not been unanimous in determining that he was guilty of any single offense yet combined their views to convict on mail fraud. Thus, concludes Bush, "the resulting conviction . . . is very possibly an amalgam of views and based not on any one 'scheme' but on a compromise verdict of a number of separate schemes." In our view there is enough evidence in the record to

support a verdict on all counts. Furthermore, we think that the jury was properly instructed so that they would not compromise their judgment and verdict. Furthermore, Bush's attack against the indictment on grounds of duplicity is misdirected. As we started previously in *United States* v. *Tanner*, 471 F.2d 128, 139 (7th Cir. 1972), citing 8 J. Moore, Federal Practice II 8.03 [1] at 8-6 and 7 (2nd ed. 1970):

> "The prohibition against duplicity is designed to protect a defendant's right under the sixth amendment to notice of the 'nature and cause of the accusation' against him so that he may prepare a defense and to guard against the possibility that 'confusion as to the basis of the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution."

In this case the indictment was quite specific. By clearly identifying the nature of Bush's scheme, its objects and the various means used to effectuate the scheme, the indictment gave Bush sufficient notice of the charge against him. Each of the eleven counts of the indictment charges only one offense—a mailing in furtherance of one multifaceted scheme in violation of the mail fraud statute. Bush's argument that the instant indictment charges distinct schemes is without support. *Weiss* v. *United States*, 122 F.2d 675, 680-1 (5th Cir.), *cert. denied* 314 U.S. 687 (1941); *Owens* v. *United States*, 221 F.2d 351, 354 (5th Cir. 1955); *United States* v. *Alpine*, 129 F.2d 737, 740 (7th Cir. 1942).

III. THE ADMISSION OF HYPOTHETICAL TESTIMONY BY GOVERNMENT WITNESSES WAS NOT PREJUDICIAL ERROR.

At trial a number of the government's witnesses were allowed to answer the following hypothetical question: "Would you have voted to award the contract to Dell Airport Advertising if you had known Earl Bush was the 100 percent owner?" This question was met by strenuous objection from Bush's very able trial counsel. The three aldermen who testified stated that they would not have approved the contract. John Duba and William Downes both answered "No" when asked this question. When Mayor Daley was asked the same question, he responded:

> "Well, I would do the reasonable thing to do. I would investigate the facts and circumstances and try to find out more about the information and I would have brought in Mr. Bush and the head of the Department of Aviation as well as the committee and talked to them about it and talked to the corporation counsel about the man."

The propriety of admitting speculative and hypothetical testimony in a judicial proceeding is always questionable. Admission of such testimony in a criminal proceeding is always highly suspect. However, in this case, having reviewed the entire trial transcript it is evident that the trial judge fully understood the issues involved and conducted the trial in what appears to have been a model of fairness. Thus on this evidentiary question we rely heavily on his direction in admitting the hypothetical question. In ruling on the objection,[1] Judge Tone specifically stated that the issue of whether city officials would have recommended the contract in the absence of a misrepresentation by Bush was material in proving the crime charged. Each city official was allowed to testify about his state of mind in order that the government could prove-up the fraud charges. Had the witnesses testified that Bush's interest would not have affected their decision then we doubt whether the jury or the court could have found that a fraud was committed. In circumstances such as this, a few limited authorities have sanctioned the admissibility of testimony elicited in response to a "what if" question.

The government places great reliance on *United States* v. *Isaacs*, *supra*, wherein the court stated:

> "Several members of the Illinois Racing Board were asked on direct examination by the prosecutor whether they would have granted racing dates to CTE for 1967 and BJC for 1968 if they had known of Kerner's concealed interest in those companies. A typical answer was that of Board member Crosby who said that he would not have voted to grant the dates. Later a similar question was asked Board member McKellar on direct examination during the defense case, and his

[1] Judge Tone originally ruled on this question in the first trial. Upon retrial he stood by his original decision.

answer was that such knowledge would not have influenced his action. This subsequent use of similar evidence minimizes, if not cures, whatever there might have been in the admission of this bit of prosecution testimony. See 1 Wigmore on Evidence, Section 18, p. 345. In any event, we believe that in a case such as that at bar, 'what if' questions were proper. *Bettman* v. *United States*, 224 F.2d 819, 830 (6th Cir.), *cert. denied* 239 U.S. 642, 36 S.Ct. 163, 60 L.Ed. 482; *United States* v. *Aleli*, 170 F.2d 18, 20 (3d Cir.); and *Searfoss* v. *Leigh Valley R. Co.*, 76 F.2d 762, 763-4 (2d Cir.)."

We believe that the Court grudgingly approved of the testimony in *Isaacs, supra*, because it was useful to both sides. But, in addition, the Court recognized that this type of evidence could be proper in future cases involving fraud and thus gave the "what if" hypothetical questions judicial approval. We concur in that approval but add the caveat that normally such questions are improper unless they are used to show that a defendant's active misrepresentations or active concealment were materially relied upon by a victim of the fraud.[8]

The defendant further argues that there were no facts, no evidence, no documents adduced at trial which would have supported the opinion testimony. Quite to the contrary, we think that the prosecutor's hypothetical question was designed to be quite concise to probe the witness' state of mind. No additional facts or documents were needed or required to answer the question other than being informed that Bush did have an interest at the time the contract was being negotiated.

The defendant has cited a number of previous decisions[9]

[8] Whether the witnesses were in fact deceived was essential to the proof of one object of the mail fraud scheme. Cf. *Phillips* v. *United States*, 356 F.2d 297, 308-09 (9th Cir. 1965) (evidence as to why victim relied upon particular representation relevant to mail fraud prosecution); *Linden* v. *United States*, 254 F.2d 560, 566 (4th Cir. 1958) (questions pertaining to why victims of scheme to defraud made or approved payments held relevant and admissible); *Haid* v. *United States*, 157 F.2d 630, 632 (9th Cir. 1946) (victim's testimony as to his state of mind in relying upon representations held relevant).

[9] See: *Elyria-Lorain Broadcasting Co.* v. *Lorain Journal Co.*, 298 F.2d 356 at 360 (6th Cir. 1961) ("a witness may not testify as to what he would have done had the situation been different from what it actually was"); *Cohen* v. *Public Housing Administration*, 257 F.2d 73, 77 (5th Cir. 1958) ("testimony years after the critical event, as to what

which have held that admission of such a hypothetical question was improper and prejudicial error. A reading of those opinions, however, discloses, to the extent it can be discerned from the opinions, that those cases involved situations in which the hypothetical testimony was elicited from an interested party or was deemed irrelevant by the trial judge. Here, on the other hand, the testimony was sought from witnesses who were not parties to the suit. Indeed, some of the opinions were given by former business associates of Bush who had no apparent desire to give testimony harmful to Bush and favorable to the government.

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Bush submits that the court gave four prejudicial instructions on scheme to defraud, duty to disclose, responsibility for decision making, and a summary instruction on defendant's duty to the city and to the mayor. We approve these instructions mainly for the reasons that are stated earlier in this opinion, all of which are based on the premise that Bush's conduct amounted to a crime cognizable under the mail fraud statute.

The first instruction[10] dealt with the scheme to defraud and advised the jury that deprivation of honest and loyal services of a public official or failure to disclose material information comes within the meaning of the statute. We think that there was authority for this instruction under *United States* v. *Barrett, supra; United States* v. *George, supra;* and *United States* v. *Rowe*, 56 F.2d 747,

[9] (Continued)
one's intentions were cannot take the place of acts done at that time"). *Boomer* v. *N.Y. Central R.R. Co.*, 409 F.2d 382, 385 (7th Cir. 1969); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 704 (8th Cir. 1967); *Whitson* v. *Aurora Iron & Metal Co.*, 297 F.2d 106, 111 (7th Cir. 1961). We recognize these cases for their precedential value but believe *United States* v. *Isaacs, supra*, to be controlling because it is so much more akin to the facts of this case.

[10] The instruction read:

"A scheme to deprive the citizens of a municipality of the honest and loyal services of a public official comes within the meaning of the term 'scheme or artifice to defraud' as that term is used in the mail fraud statute. Similarly, a scheme to deprive public officials of information material to a decision which they are required to make in their official capacity also comes within the meaning of a 'scheme or artifice to defraud' as used in the mail fraud statute."

749 (2d Cir.), *cert. denied* 286 U.S. 554 (1932). Since the deceitful concealment of material facts can be considered actual fraud the trial judge's instruction was appropriate. *Lustiger* v. *United States*, 386 F.2d 132, 138 (9th Cir. 1967), *cert. denied* 390 U.S. 951 (1968); *Cacy* v. *United States*, 298 F.2d 227, 229 (9th Cir. 1961).

The second instruction[11] to which Bush objects concerns his duty of disclosure. He contends that the central error in the instruction is that it states that he had a "duty imposed by law" to disclose his interest. In Bush's view, the instruction is incorrect because no such law exists. As previously discussed, however, *United States* v. *George*, *supra*, plainly states that an employee owes his employer a duty of loyalty which includes a duty not to conceal facts known to him which he has reason to believe are material to the employer's conduct of its business and affairs. Thus, Bush's duty to disclose need not be based upon the existence of some statute prescribing such a duty. Rather, his duty in this case was predicated upon the right of city officials to negotiate for and award the O'Hare display advertising contract with all relevant facts before them. Bush's introduction of Robert Dell to Commissioner Downes without an accompanying disclosure of his ownership of DAAI, his recommendation of DAAI to Deputy Mayor Duba without disclosure of his interest and his recommendation to Commissioner Downes concerning a profit-generating advertising display while, at the same time, denying that he had any interest in DAAI, constitute material misrepresentations and involve the concealment of material facts.

The third contested instruction informed the jury that "[t]he fact that the defendant did not himself have responsibility for the evaluation, awarding or administration of contracts does not change his duty of disclosure." Once again under decisions discussed extensively heretofore, *United States* v. *Proctor & Gamble Co.*, *supra*, and *United*

[11] The instruction read:

"The defendant, as Press Secretary and Director of Public Relations in the Office of the Mayor of the City of Chicago, had a duty imposed by law to disclose and not conceal facts known to him which he had reason to believe were material to the decisions of City officials in their conduct of the evaluation of contract proposals and the awarding and the administration of contracts."

States v. *George*, *supra*, Bush, as an employee of the City of Chicago, owed a fiduciary duty of loyalty to his employer. Consequently, it is immaterial whether or not he had direct responsibility for the contracts. His duty of disclosure remained the same in either situation.

The fourth and last challenged instruction[12] did not, as Bush contends, virtually direct the jury to bring back a finding of guilty. Rather, the instruction simply stated that the jury may find the existence of a scheme within the meaning of the mail fraud statute if it should find, from all the evidence, that Bush devised a scheme in which he would breach his duty of disclosure.

This instruction, however, must be considered in the context in which it was given. Viewing it together with the court's charge on intent, this instruction did not direct the jury to return a guilty verdict. Thus, immediately after giving the instruction here at issue, the court charged the jury that:

"The defendant claims that he did not have the specific intent previously defined in these instructions and he has offered evidence of his good faith in forming Dell Airport Advertising, Inc., and in seeking and in performing the airport advertising contract and the renewal of that contract. This contention of good faith is based on his testimony that he did not know that he had the duty of disclosure previously defined in these instructions, that is, the duty to disclose his ownership of Dell Airport Advertising, Inc., to the Mayor and other officers of the City who had responsibility in connection with the awarding of the airport advertising contract.

Defendant has thus offered evidence that he did not know that any failure to disclose would violate a duty imposed by law. Unless outweighed by evidence to the contrary, the law presumes that every person knows what the law forbids and what the law requires to be done. Specific intent is an element of the crime charged in the indictment. Therefore, evidence that defendant failed to disclose because he did not know

[12] The instruction read:

"If you should find, beyond a reasonable doubt, after considering all the evidence, that the defendant devised a scheme in which he would breach his duty of disclosure, then you may find the existence of a scheme which was an element of the offense of mail fraud."

he had a duty to disclose is to be considered by the jury in determining whether or not the defendant acted or failed to act with the required specific intent. You cannot find the defendant guilty unless you find beyond a reasonable doubt that he had the specific intent previously defined and that he did not act in good faith."

Additionally, the court instructed the jury with respect to Bush's duty to disclose that:

"Except for this Illinois statute [requiring municipal employees earning $20,000 per year or more to file verified statements of economic interests], at all times described in the indictment there has not been any other Illinois statute or municipal ordinance of the City of Chicago requiring a person holding a municipal position, including the defendant's position, to disclose and report his interest in and income from any company or entity doing business with the city by which he was employed. Evidence has been introduced that defendant filed a correct, verified written statement of economic interest with the County Clerk before July 1, 1972 and before April 30, 1973. You may consider this evidence in deciding whether or not the defendant acted in good faith."

Since the charge to the jury with respect to Bush's duty of disclosure accurately reflects the state of the law, and because the charge required a finding of specific intent to defraud as a prerequisite to a finding of guilt and informed the jury that good faith was a complete defense, no error can be attributed to the instructions here at issue.

Accordingly the judgment of conviction is affirmed in all respects.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

No. 74-1969

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARL BUSH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74 Cr 458
Robert A. Sprecher and **William J. Bauer**, *Circuit Judges*,
William G. East, *Sr. District Judge*.

NOVEMBER 11, 1975 — DECIDED ——

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX D

No. 74-1969
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EARL BUSH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74 CR 458
Philip W. Tone, *Circuit Judge.*

November 13, 1975 — DECIDED —

This matter comes before the court on "Motion For Stay Of Mandate Pending Application For A Writ Of Certiorari" filed herein on November 12, 1975 by counsel for the defendant-appellant. On consideration whereof,

IT IS ORDERED that the mandate of this Court is hereby STAYED to and including December 11,. 1975, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX E

Title 18 U.S.C.A.

Chapter 63—Mail Fraud

Sec.

1341. Frauds and swindles.
1342. Fictitious name and address.[1]
1343. Fraud by wire, radio, or television.

[1] So in original. Does not conform to section catchline.

Historical Note

1952 Amendment. Act July 16, 1952,c. 879, § 18(b), 66 Stat. 722, added item 1343.

§ 1341. Frauds and swindles

Whoever, (having devised or intending to devise any scheme or artifice to defraud,) or (for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,) or (to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article), or (anything represented to be or intimated or held out to be such counterfeit or spurious article) for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

Constitution Of The United States, Art. 1, Sec. 10

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 75-821

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1975

EARL BUSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-821

EARL BUSH, PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence at trial did not establish his participation in a scheme to defraud, within the meaning of the mail fraud statute, and that it was not reasonably foreseeable that the mail fraud statute would be construed to make criminal the conduct in which he had engaged.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of eleven counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent one-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. B).

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[1]In August 1974, petitioner was tried on a twenty-count indictment; a mistrial was declared after the jury had acquitted petitioner of the charges contained in Counts 12 through 20 but had been unable to reach a verdict on Counts 1 through 11.

The evidence at trial showed that petitioner served from 1955 to 1973 as Press Secretary and Director of Public Relations for Chicago Mayor Richard J. Daley. He was also the owner of Dell Airport Advertising, Inc. (DAAI), a company which at all times material hereto had an exclusive contract with the City of Chicago for display advertising at Chicago's O'Hare International Airport. The indictment arose out of petitioner's use of his position in the mayor's office to influence the City's award and administration of the display advertising contract.

In May or June of 1961, petitioner met with Robert Dell, President of Dell Displays, Inc., to solicit Dell's participation in a joint venture relating to advertising exhibits at O'Hare. Dell responded favorably and other meetings followed. Petitioner subsequently incorporated DAAI[2] and the company entered into a joint venture agreement with Dell Displays, Inc. (Tr. 91-94). The agreement provided in part that "[DAAI] has received or will receive from the City of Chicago, a contract or contracts for * * * exclusive [advertising rights at O'Hare Field]" (Govt. Exh. 2-2). Under the terms of the agreement, Dell Displays, Inc., was to develop advertising ideas, design the displays, and sell them to advertisers, and DAAI was to hold the contract for that work with the City of Chicago (Tr. 94-95). Petitioner's responsibility was to promote the contract with city officials (Tr. 118-119).

In the fall of 1961, as preparations were being made to submit a proposal to the City of Chicago for the display advertising concession at O'Hare, petitioner told Dell that petitioner's name should not be used in connection

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[2]The company was originally incorporated as "Terminal Art, Inc." (Govt. Exh. 4-1). Petitioner was at all material times the sole owner of the stock, although it was held by nominees (Tr. 275; Govt. Exh. 4-1).

with any work regarding the airport contract (Tr. 97). After DAAI's proposal had been submitted, petitioner spoke several times about the proposal with Deputy Mayor John Duba, informal chairman of the committee responsible for recommending a company to receive the contract. Petitioner told Duba that DAAI was a reliable advertising firm and was capable of carrying out a display advertising program at O'Hare (Tr. 144, 150-157, 298-299). At no time did petitioner disclose to Duba that he had any interest in DAAI (Tr. 157).

In late 1961 Duba recommended to Mayor Daley that DAAI be awarded the display advertising contract at O'Hare (Tr. 145-146). Although Duba considered a variety of factors, he placed great weight on petitioner's recommendation because of petitioner's expertise in the field of public relations and advertising (Tr. 157-158, 160). On November 1, 1961, the City Council approved the award to DAAI (Govt. Exhs. 1-1, 21-1). The contract was renewed in October 1967 upon the recommendation of the Mayor and Aviation Commissioner Downes (Tr. 303-304). Prior to its renewal, petitioner affirmatively represented to Downes that he had "no connection whatsoever with the company" (Tr. 231).

From the time the contract was awarded in 1962 until it was renewed in 1967, petitioner received $40,000 from DAAI. Rather than going directly to him, however, the DAAI checks intended for petitioner were made payable to Information Consultants and sent to a friend of petitioner's who owned that company. For each DAAI check deposited in Information Consultants' account, a check in the same amount was drawn to petitioner (Tr. 124-125, 134-136). In September 1966 petitioner's counsel advised him that his DAAI stock, still being held by nominees, should no longer be so held. Because petitioner did not want the stock registered in his own

name, a trust was created to hold it, and the stock was transferred to Sebat Co., the nominee for Sears Bank & Trust Co. (Tr. 276-278).

Shortly after the creation of the trust, DAAI began to pay dividends to petitioner, its sole shareholder, for the first time. As with the earlier monies sent to petitioner by DAAI, the proceeds of the DAAI dividend checks reached him by circuitous means.[3] DAAI mailed the dividend checks, made payable to Sebat Co., to petitioner's attorney,who in turn mailed each check, without making any bookkeeping entries or otherwise processing the check, to Sears Bank & Trust Co., which then deposited the check in petitioner's trust account (see Pet. App. A, pp. A-1 to A-10). Petitioner received $162,000 from DAAI in this manner (Tr. 278-280, 334-335, 426-427). Ten of the mailings so used to make surreptitious payments to petitioner formed the basis for mail fraud counts on which petitioner was convicted.[4]

1. Petitioner contends that the mailings charged in the indictment were not sufficiently related to the fraudulent scheme to provide a basis for his conviction under the mail fraud statute since the scheme had already been consummated at the time of the mailings. This contention was not presented to the court of appeals and, accordingly, should not be considered by this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn*

[3]Petitioner's name did not appear on any of the DAAI checks intended for him and, as a consequence, DAAI's books did not show that petitioner had received the money (Tr. 128-129). Under the terms of DAAI's contract with the City of Chicago, city inspectors had the right to inspect DAAI's books at any time (Govt. Exh. 1-1).

[4]The eleventh count was based upon a letter to Commissioner Downes of the Chicago Department of Aviation that implied that Dell, rather than petitioner, was the responsible officer in DAAI (Pet. App. A, p. A-11).

v. *United States*, 355 U.S. 339, 362-363 n. 16. In any event, it is without substance.

The elements of the offense of mail fraud under 18 U.S.C. 1341 are (1) a scheme to defraud and (2) a mailing for the purpose of furthering the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8. Whether the mails were used before the scheme was fully executed is, of course, a determintion that must be made on a case-by-case basis. Petitioner argues that, as the sole owner of DAAI stock, he received the proceeds of his scheme simultaneously with the receipt by DAAI of the payments to which it was entitled under the contract with the City, and that therefore the scheme had reached fruition prior to the mailings (Pet. 10, 16, 17). This argument overlooks the basic fact that a corporation is a legal entity, separate and distinct in identity from the members who compose it. *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442. Not until the transfers of funds from DAAI to petitioner had occurred had "[t]he persons intended to receive the money * * * received it irrevocably." *Kann* v. *United States*, 323 U.S. 88, 94. The surreptitious DAAI payments to petitioner were not "immaterial to [him], or to any consummation of the scheme" (*ibid.*), but rather were the very essence of it.[5] "[M]ailings related to the distribution of proceeds resulting from the * * * scheme * * * [are] in furtherance of the scheme because the success of the

[5]Petitioner argues (Pet. 3, 16) that the mailings in no way served to conceal the scheme. However, the particular means by which a mailing serves to execute a scheme is immaterial, and it is not necessary that the mailings serve to forestall discovery or delay detection. See *Kann* v. *United States*, 323 U.S. 88, 94-95. The mailings in *United States* v. *Maze*, 414 U.S. 395, which were held to be insufficiently related to the scheme to defraud, are readily distinguished. The fraudulent credit card scheme involved in *Maze* had already reached fruition at the time of the mailings, which were merely for the purpose of settling accounts between joint victims of the scheme. *Id.* at 402.

venture depended upon receipt of funds laundered by nominees * * *." *United States* v. *Isaacs*, 493 F. 2d 1124, 1151 (C.A. 7), certiorari denied, 417 U.S. 976.

2. Petitioner also contends that the court of appeals' holding that he had been guilty of a scheme to defraud within the meaning of the mail fraud statute constituted an unforeseeable judicial enlargement of that statute and that the conduct for which he was prosecuted was not a crime when he engaged in it. But the court of appeals' holding in this case is consistent with the interpretation given the mail fraud statute by other circuits. By its own terms, 18 U.S.C. 1341 prohibits "*any* scheme to defraud" that employs the use of the mails (emphasis added). *Gouled* v. *United States*, 273 Fed. 506, 508 (C.A. 2); *United States* v. *Edwards*, 458 F. 2d 875, 880 (C.A. 5), certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891. Although, as the court of appeals recognized, a mere breach of a fiduciary duty "could never be considered a crime under the mail fraud statute" (Pet. App. B, p. A-21), where a breach of fiduciary duty is accompanied by conduct demonstrating a specific intent to defraud, the consequent deprivation of honest and faithful services is cognizable as criminal fraud. A knowledgeable or purposeful breach of a fiduciary duty is a major type of dishonesty for the facilitation of which the mail fraud statute penalizes the use of the postal service. *Post* v. *United States*, 407 F. 2d 319 (C.A. D.C.), certiorari denied, 393 U.S. 1092; *United States* v. *George*, 477 F. 2d 508 (C.A. 7), certiorari denied, 414 U.S. 827. Furthermore, it is settled that a scheme to defraud the public of a public official's honest and loyal services may provide the basis for a conviction under the mail fraud statute. *Shushan* v. *United States*, 117 F. 2d 110, 115 (C.A. 5), certiorari denied, 313 U.S. 574; *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1150. The exception to this rule suggested by petitioner for public officials who, like petitioner, are appointed rather than elected would create an

unwarranted exception to the broad statutory prohibition that has no basis in either its language or its purpose.[6]

3. Contrary to petitioner's contentions (Pet. 20), the court of appeals did not hold that a municipal employee's failure to disclose his stock interest in a company dealing with the city is *per se* a scheme to defraud, but only that there was ample evidence from which a jury could have inferred fraudulent intent in the circumstances of this case. Such intent may, of course, be proved circumstantially. *United States* v. *Jones*, 425 F. 2d 1048, 1058 (C.A. 9). The court of appeals correctly held that the jury in the present case reasonably could have inferred the necessary criminal intent from petitioner's "misrepresentations, his failure to disclose his interest in DAAI, his falsification of his statements of economic interest filed with the mayor, his use of multiple nominees, conduits for payments, and a numbered trust account to hide his ownership" (Pet. App. B, p. A-23). The fact that DAAI's contract with the City was profitable for the City has no bearing on petitioner's intent to defraud. A scheme to secure a public contract on more favorable terms than would likely be obtained otherwise constitutes a scheme to defraud the public. *Shushan* v. *United States*, *supra*, 117 F. 2d at 115. The mail fraud statute is not restricted to cases in which the victim suffered an actual monetary or property loss. *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1149-1150. The court of appeals concluded, moreover, "that the city in this case did suffer pecuniary injury" (Pet. App. B, p. A-22).

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[6]Petitioner attempts (Pet. 19) to phrase in constitutional terms his contention that he had no notice his conduct was criminal. As already demonstrated, however, there was ample precedent for the court of appeals' interpretation of the mail fraud statute, and petitioner's argument that he had no fair warning that his conduct was criminal must therefore be rejected.

Petitioner's argument that he did no more than fail to disclose interests which he was under no legal duty to disclose ignores the evidence. As stated by the court of appeals (Pet. App. B, p. A-21):

> [W]e think that Bush did more than breach his fiduciary duty; he materially misrepresented his interests.
>
> Bush was not making his recommendation merely as a disinterested public servant. His ownership of DAAI was material to the city officials' evaluation of Bush's opinion of the company which he was recommending. Moreover, as the trial judge observed in ruling on Bush's motion to dismiss the indictment, Bush's "statement that the company was 'reputable' without disclosing that it was the device by which the Mayor's Press Secretary secretly derived profits from a city contract was itself a material misrepresentation."

The information that Bush owned DAAI and would receive profits as a result of DAAI's city contract was information material to those city officials who were to evaluate and recommend a proposed contract and to those in the City Council who were to award a contract. That information was material to a decision as to whether to award the contract to DAAI and, if so, at what price. Assuming that the city would have been willing to do business with a company owned by Bush, the fact that Bush would be receiving profits as a result of the contract was material to the question of what percentage of DAAI's profits should be turned over to the city.

Bush was not responsible for awarding the O'Hare advertising contract, but he used his official position within the mayor's inner circle to exert the substantial influence which he had on those who were

> responsible for negotiating the contract. He did so without advising them that he was vitally interested in the contract or that his sole responsibility under the terms of the contract was to promote it. After the contract was awarded, Bush took steps to insure that the proceeds of the venture could not be traced to him, misrepresented his interest to assist in assuring that the contract would be renewed and filed false documents to continue his employment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

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1. *This case presents a radical expansion of the mail fraud statute.* The Seventh Circuit's Opinion states:

> "What makes this case so difficult is perhaps the subtlety of the scheme in which Bush was engaged. *There is no concrete evidence of extortion, bribery, kickbacks, or a violation of any criminal law* other than the mail fraud statute." (Op. at 8, emphasis supplied.)

2. The "Memorandum of the United States in Opposition" states:

> "The indictment arose out of petitioner's use of his position in the mayor's office to influence the City's award and administration of the display advertising contract." (Govt. Mem., p. 2.)

The term "influence in this context is elusive. Petitioner at no time disclosed his interest in Dell Airport Advertising. Dell

submitted the bid most favorable to the City. This is not a situation in which Dell was awarded the contract because of Petitioner's interest; on the contrary, Dell was awarded the contract *despite* Petitioner's interest.

3. The "Memorandum of the United States in Opposition" fails to address the serious conflict within the Seventh Circuit relative to the proper application of this Court's *Maze* decision.

4. The Solicitor General incorrectly asserts that Point I of the Petition was not presented to the Court of Appeals. In fact, Point I was presented, argued and thereby preserved in the Petition for Rehearing, which was duly considered and denied by the Seventh Circuit.

5. The Solicitor General urges that affirmance of the Seventh Circuit's holding on the basis that, if Petitioner demonstrated a specific intent to defraud, it is not necessary that an actual fraud have been perpetrated. Herein lies the essence of the Seventh Circuit's unforseeable judicial enlargment of the Mail Fraud Statute. Unlike in cases of bribery, kickbacks or the like, there is no proof, in Petitioner's case, that any fraud was perpetrated. Keeping one's financial interests confidential, especially where one is not an elected official, does not constitute fraud. In Petitioner's case, there is not one wit of evidence that the City was harmed by the Dell contract. Quite the contrary, all the evidence shows that the Dell contract was the best among all alternatives and was highly profitable for the City.

6. The "Memorandum of the United States in Opposition" consistently contends that Dell Airport Advertising, Inc., paid the contract proceeds *to* Petitioner. However, Petitioner and Dell Airport Advertising, Inc., were *one in the same*. The Solicitor General's contention that a corporation is a separate legal entity does not apply to this situation. In *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, this Court stated:

> "Of course, the rule [that a corporation and it stockholders are deemed separate entities] is subject to the qualification that the separate identity may be disregarded

> in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights." (292 U. S. at 442.)

In this case, where Petitioner was *sole* shareholder in Dell Airport Advertising, Inc., and where the government seeks to impose criminal sanctions, it should be estopped from relying on civil standards.

7. Because the mailings in this case were immaterial to consummation of the alleged scheme, this case falls squarely within this Court's *Maze* decision. Nor did Petitioner, by the mailings, transmitting the proceeds to the "Earl Bush Trust", seek to delay apprehension or conceal his interest.

CONCLUSION.

This Court should clearly rule, for the benefit of others who might seek to keep their personal financial affairs private, whether Petitioner's conduct constitutes mail fraud.

The line of Seventh Circuit mail fraud cases relied on by the Government—all decisions subsequent to the conduct for which Petitioner was convicted and all involving bribery, kickbacks or other criminal conduct, cannot be applied to Petitioner. The Solicitor General fails to cite any authority that supports a mail fraud conviction in the Petitioner's case.

This Court also should settle the conflict between the Circuits, and within the Seventh Circuit, with respect to the application of the *Maze* decision.

It is, therefore, respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 27, 1976.